No officer or enlisted man in the organized militia, shall refuse to appear at the time and place designated when lawfully directed to do so in conformity to the laws for the suppression of tumults, riots, and mobs, or shall fail to obey an order issued in such case. [See: penalty provision, O.R.C., Section 5923.99(A) *infra.*]

Section 5923.231:

After issuing an order to duty pursuant to section 5923.21 of the Revised Code, the governor, if in his judgment any breakdown of law and order impends, may by proclamation, declare that the organized militia under the command of the governor shall execute the laws and keep the peace in a designated area. Under these circumstances, any arrest and detention of civilians by military authorities shall be for the purpose of escorting such civilians to civil authorities. The governor shall, by subsequent proclamation, order cessation of the duties entrusted to the militia when, in his judgment, his original proclamation is no longer required.

Section 5923.99 (A):

Whoever violates Section 5923.22 or 5923.31 of the Ohio Revised Code shall be fined not more than one thousand dollars or imprisoned not more than six months, or both.

STATEMENT OF THE CASE

Respondent Rhodes concurs with the partial restatement of Petitioners' "Statement of the Case" offered in the Brief of Respondents Del Corso, et al. In particular, Respondent Rhodes would emphasize the following:

1. Affidavits containing the Executive Proclamations calling units of the National Guard to active duty were attached to Respondents' Motion to Dismiss and constituted evidence before the trial court of the need for such action and the nature of the orders issued by Respondent Rhodes.

2. The amended Krause complaint alleges (para. 3):

> "The defendant *Governor* James Rhodes at all times herein mentioned, was the Governor ***", etc. (Emphasis added.)

The Miller complaint alleges (para. 2):

> "At all times herein mentioned, defendant Rhodes *** exercised certain powers and authority *** under color of the laws of the State of Ohio *as its agent, servant and employee.*" (Emphasis added.)

3. Respondent Rhodes did not fire, and is not alleged in either complaint to have fired, any shot killing the decedents of either Petitioner.

REASONS FOR DENYING THE WRIT

In the Brief of Respondents Del Corso, et al., Petitioners' Questions are dealt with in this order:

1, 3 & 4, 2 & 4, 5. As Respondent Rhodes' argument supplements and parallels that argument, the same order will be followed herein under the headings:

I. The District Court Applied the Proper Rule in Considering Allegations of the Complaints.

II. The District Court Properly Dismissed the Complaints for Failure to State a Claim Upon Which Relief Could be Granted.

III. The District Court Lacked Jurisdiction of the Subject Matter of the Complaints.

IV. Petitioners' Complaints, to the Extent They Charged Improper Training, Arming and Procedures of the Ohio National Guard, Raised Political Questions that are not Justiciable.

V. Petitioners' Allegations that Training, Arming and Procedures of the Ohio National Guard were Improper, Indispensably Require Joinder of the United States of America as a Party Defendant.

ARGUMENT

I. THE DISTRICT COURT APPLIED THE PROPER RULE IN CONSIDERING ALLEGATIONS OF THE COMPLAINTS.

Without specifying it, Petitioners transparently relied on Rule 8(d), Fed. R. Civ. P., as their chief buttress for an erroneous assumption on which their first Question is erected.[1] That assumption is that any allegation in the Complaints not controverted by a responsive pleading must be taken as true. However, Rule 12(b) authorizes the defense that the Court lacks jurisdiction over the subject matter to be presented by motion [12(b)(1)]. Similarly, the same Rule permits presentation by motion [12(b)(6)] the defense that the Complaint fails to state a claim upon which relief can be granted. Respondent Rhodes followed a procedure sanctioned by the Federal Rules in filing his separate Motion to Dismiss in the Krause and Miller cases.

II. THE DISTRICT COURT PROPERLY DISMISSED COMPLAINTS FOR FAILURE TO STATE A CLAIM UPON WHICH RELIEF COULD BE GRANTED.

The second branch of Defendant-Respondent Rhodes' separate Motion to Dismiss in the District Court in the Krause case, pursuant to Rule 12(b)(6), Fed. R. Civ. P., was grounded on the failure of the second cause of action to state a claim on which relief can be granted. Supporting the Motion were the affidavits containing the Executive Proclamations issued April 29 and May 5, 1970. Their inclusion brought into play the last sentence

[1] Rule 8(d) Fed. R. Civ. P.—Averments in a pleading to which a responsive pleading is required, other than those as to the amount of damage, are admitted when not denied in the responsive pleading. Averments in a pleading to which no responsive pleading is required or permitted shall be taken as denied or avoided.

of Rule 12(b) under which a Motion to Dismiss is treated as one for summary judgment and disposed of pursuant to Rule 56.

The sworn evidence produced before the Court by means of the affidavits containing the Executive Proclamations rebutted the allegations of the Complaint and removed any requirement that the Court accept such allegations as true. Subdivision (e) of Rule 56, Fed. R. Civ. P., specifically provides that sworn affidavits can cut down allegations in pleadings. The last two sentences of Rule 56(e) read as follows:

> "When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him."

The Brief in Opposition to the Petition for Certiorari filed in behalf of Respondents Del Corso, et al., develops generally the scope of executive immunity. So far as Respondent Rhodes is concerned, it should suffice to point out that this Court has unhesitatingly given the protection of absolute immunity to a governor who calls out the National Guard to put down disorder and insurrection and who issues to the Guard orders directed toward that end. Even Judge Celebreeze, in his dissent below, conceded:

> "The Supreme Court has consistently ruled that the excutive decision to call up the militia is conclusive, and in and of itself, is not subject to judicial review." (Scheuer Appendix, 69a.)

What Judge Celebrezze there conceded can fairly be construed to be the import of *Moyer v. Peabody*, 212

U.S. 78 (1909), which, like the instant case, was an action brought under the Civil Rights Act to recover damages from a former governor of Colorado for a trespass. The complaint was dismissed on demurrer. Certiorari was denied, and the Court, speaking by Justice Holmes, said in part:

> "As no one would deny that there was immunity for ordering a company to fire upon a mob in insurrection, and that a State Law authorizing the Governor to deprive citizens of life under such circumstances was consistent with the 14th Amendment, we are of opinion that the same is true of a law authorizing by implication [the imprisonment ordered in this case]."
>
> *Moyer* v. *Peabody*, 212 U.S. 78 at p. 85.

In *Sterling* v. *Constantin*, 287 U.S. 378 (1932), this court dismissed an appeal from an order enjoining the Governor of Texas from using the National Guard to enforce oil production quotas, but in so doing, referred to and approved *Moyer* v. *Peabody, supra,* in these words (Chief Justice Hughes, at page 399):

> "By virtue of his duty to 'cause the laws to be faithfully executed,' the Executive is appropriately vested with the discretion to determine whether an exigency requiring military aid for that purpose has arisen. His decision to that effect is conclusive."

Chief Justice Hughes then carefully distinguished the Governor's executive immunity, acknowledged when he calls out the National Guard and acts to suppress disorders and breaches of the peace, from the case before him in which the Governor of Texas sought to use troops to regulate the production of oil. (Pages 401, 402.)

In the District Court, Petitioners in both the Krause and Miller cases sought to insulate their complaints from dismissal for want of jurisdiction by making extravagant conclusionary allegations that Respondent Rhodes

acted recklessly, willfully, and wantonly. For example, the Krause Amended Complaint alleges:

> "10. The ordering of these improperly trained and armed troops onto the Kent State Campus, on the part of these defendants in complete and utter indifference and disregard for the lives of students on the Kent State Campus, including Plaintiff's decedent Allison Krause, constituted culpable, gross, wanton, and reckless misconduct under the circumstances***." (Pet. Appendix 49.)
>
> "11. * * * Suddenly and without warning and without cause or justification, National Guard Troops fired live ammunition at a large group of students and people, intentionally, willfully, wantonly and maliciously disregarding the lives and safety of the students * * * including Allison Krause * * *." (Pet. Appendix 49.)

Similarly, the Miller complaint alleges:

> "8. * * * these defendants intentionally, recklessly, willfully and wantonly engaged in the following acts among other things which caused or contributed to the causing of the deprivations alleged * * *." (Pet. Appendix 54.)

Such extravagant and unjustified accusations were instantly negated by facts of which the District Court took judicial notice, triggered by the incorporation into the Motion to Dismiss of Respondent Rhodes' Proclamations as Governor on April 29 and May 5, 1970, reciting the necessities that gave rise to the use of National Guard Troops in aid of the civil authorities.

Petitioners' wrongful death actions brought under 28 U.S.C. §1332 are subject to the same arguments arising out of Eleventh Amendment immunity to suit as have heretofore been advanced with respect to the

deprivation of civil rights actions. To avoid repetition, the arguments are simply referred to and adopted. Moreover, under the rule of *Erie R. Co.* v *Tompkins*, 304 U.S. 64 (1938) and the provisions of 28 U.S.C. §1652, Federal Courts in Ohio must follow Ohio's immunity to suit under its own Constitution (Article I, §16) and its own case law. For full development of this argument, which governs with respect to diversity jurisdiction claims against Respondent Rhodes, reference is made to the Brief In Opposition filed herein in behalf of Respondents Del Corso, et al.

Petitioners have asserted a waiver of immunity and a consent to suit by force of §5923.37, Ohio Revised Code. These assertions are also well answered in the Brief in Opposition filed by Respondents Del Corso, et al, and the answers apply equally to Respondent Rhodes. Furthermore, as is developed later herein in the discussion of lack of subject matter jurisdiction, neither the status nor conduct of Respondent Rhodes is embraced by the language of §5923.37.

III. THE DISTRICT COURT LACKED JURISDICTION OF THE SUBJECT MATTER OF THE COMPLAINT.

The first branch of Defendent-Respondent Rhodes' separate Motion to Dismiss both causes of action in the Krause case and the first cause of action in the Miller case pursuant to Rule 12(b)(1), Fed. R. Civ. P., was based upon the Court's lack of jurisdiction of the subject matter. *Moore's Federal Practice* in its treatment of Rule 12(b) motions describes the type filed by respondent Rhodes as a "speaking motion," one that to be sustained requires reference to facts not appearing on the face of the pleading attached. The facts needed were supplied in the sworn affidavits embracing the

Executive Proclamations issued by respondent Rhodes as Governor of Ohio on April 29 and May 5, 1970. With the Proclamations before it, the Court was enabled to take judicial notice of matters of public record and common knowledge with respect to events on the Kent State University campus April 29 through May 4, 1970.

As rebuttal to the content of the sworn Executive Proclamation, petitioners, without identifying the source of the quotation, have quoted extensively (Pet. 11) from material they describe as "conclusions drawn by the United States Department of Justice from the findings of the Federal Bureau of Investigation after an exhaustive inquiry * * *". All such quotations are of unknown source, unsworn and extraneous to the record.

The Brief in Opposition filed by Respondents Del Corso, et al. develops in detail the doctrine of sovereign immunity as applied to the facts in these cases. That Brief stresses and documents that the immunity of a State to suit by citizens of another State cannot be bypassed by naming personal party defendants when the action essentially affects the State. The petitioners assert that opinions of the District Courts "disregard the established holding of this Court in *Ex parte Young*, 209 U.S. 123 (1908) where it was held that the immunity of a State provided in the Eleventh Amendment did not extend to a state official charged with violating the Federal Constitutional Rights of citizens." (Pet. 16) However, *Ex Parte Young* lays down a principle so much narrower than asserted that the Court of Appeals correctly found the case to be "inapposite." (Scheuer Pet 12a.) What *Ex Parte Young* stands for is that " * * * individuals who, as officers of the State, are clothed with some duty in regard to the enforcement of the laws of the State, and who threaten and are about to commence

proceedings, either of a civil or criminal nature, to enforce against parties affected an unconstitutional act, violating the Federal Constitution, may be enjoined by a Federal Court of equity from such action." *Ex Parte Young,* 209 U.S. 123 at 155. As Chief Judge Weick observed in the Court of Appeals' opinion herein, "*Ex Parte Young* * * * was an action for injunction * * *. Our case, on the other hand, is an action for damages and also involves the question whether the Federal Courts should interfere with the performance by the state's chief executive of his highest duty to suppress riots or insurrections and protect the public." (Scheuer Pet. 12.) Moreover, Governor Rhodes' calling out the National Guard on April 29, 1970, constituted a completed exercise of office, and thus a completed act of the State, not a threatened action "under cover of law."

The petitioners suggest that the question is raised "* * * whether U.S.C. Title 42, Section 1983 is unconstitutional because it violates the Eleventh Amendment." (Pet. 18.) Clearly, it is not rendered unconstitutional by the Eleventh Amendment, but its use is properly limited by that amendment. As Senior Circuit Judge O'Sullivan said in his concurring opinion below, "in this case, we deal again with the ever-widening employment of Section 1983 for a purpose 'not plainly apparent from its language,' as such language was employed by the Congress when it adopted the Section in 1871 to combat some of the wrongs of our post-Civil War society. (Scheuer Pet. 27a)

As one of the decisions that the petitioners claim to have "adumbrated" the principle of *Ex Parte Young,* supra, *Ford Motor Company* vs. *Treasury Department of Indiana,* 323 U.S. 459 (1944) is cited. While the case

may adumbrate, it does not support the principle argued for by petitioners. The action in *Ford Motor Company* was held to be against the state and not maintainable because the state had not consented to sued.

The Brief in Opposition filed by Respondents Del Corso, et al, previously adopted in behalf of Respondent Rhodes, clearly documents the bar of the Eleventh Amendment to the petitioners' causes of action asserted under diversity jurisdiction. (28 U.S.C. Section 1332). Moreover, as that Brief points out, petitioners would have no right of recovery under Ohio's own law, in particular Article 1, Section 16 of the Constitution of Ohio, as applied in a parallel case, *Krause Administrator* vs. *Ohio*, 31 O.S. 2d 132, 285 NE 2d 736, appeal denied, 34 L. Ed. 2d 506; Petition for Rehearing denied, 35 L. Ed. 2d 208 (1972).

Without distinguishing between Respondent Rhodes who, by force of the Constitution of Ohio was, ex officio, Commander in Chief of its organized militia, and the other Respondents who became officers and enlisted members of the militia pursuant to statute, petitioners have asserted a right to recover pursuant to Section 5923.37, Ohio Revised Code. Without conceding that the thrust of that statute is to waive sovereign immunity under the facts of these cases, Respondent Rhodes points out that his status and conduct were not embraced within the language of the statute: (1) He was not ordered "to duty by state authority" but was the public officer through whom the state authority was exercised. (2) He took none of the actions complained of "at the scene of" the Kent State University area of disorder. (3) No act of respondent Rhodes can sensibly be characterized as "one of willful or wanton misconduct."

IV. PETITIONERS' COMPLAINTS, TO THE EXTENT THEY CHARGE IMPROPER TRAINING, ARMING AND PROCEDURES OF THE OHIO NATIONAL GUARD, RAISE POLITICAL QUESTIONS THAT ARE NOT JUSTICIABLE.

Reference is again made to the Brief in Opposition filed on behalf of Respondents Del Corso, et al, in this instance for its discussion of the non-justiciability of a political question.

The federal cases have for years yielded to the executive the decision of political questions. Typical of the cases have been *Cherokee Nation vs. Georgia*, 5 Pet. 1; *Marbury vs. Madison*, 1 Cranch 137; and *Coleman vs. Miller*, 307 U.S. 433. Then came Justice Brennan's opinion in *Baker vs. Carr*, 396 U.S. 186 (1962) that seemed to settle for all time that a case like the Krause and Miller cases against Respondent Rhodes must be treated as non-justiciable because a decision to call out the National Guard is "political".

Article I, Section 8, Clause 16 of the U. S. Constitution empowers Congress to "provide for organizing, arming and disciplining the Militia; * * * reserving to the States, respectively, the Appointment of the Officers and the Authority of training the Militia according to the discipline prescribed by Congress." Congress has so provided in Title 32, United States Code, and has stated that:

> "— a state that does not comply with Title 32 shall lose its National Guard money" (Section 108);
> "The President shall be the source of regulations and orders to organize, discipline, and govern the National Guard" (Section 110);
> "— the discipline, including training, of the Army National Guard shall conform to that of the Army and the discipline of the Air National Guard to that of the Air Force" (Section 501);

"— the Army and Air National Guard shall use Army and Air Force type uniforms, respectively" (Section 701).

It is therefore clear that Respondent Rhodes' calling out the National Guard was in a context containing the indicia of a political question as defined by Justice Brennan: "Prominent on the surface of any case held to involve a political question is found a textually demonstrable constitutional commitment of the issue to a coordinate political department * * *" *Baker vs. Carr*, 369 U.S. 186 at 217 (1962). In this instance the "coordinate political department" is the Executive, i.e., the Presidency.

The Brief in Opposition filed in behalf of Respondents Del Corso, et al., quotes the criteria for determining the existence of a political question as listed by this Court in *Baker v. Carr*, 369 U.S. 186 at 217 (1962). The Brief then demonstrates, point by point, how every criterion has application to the two cases at bar. The conclusion is inescapable that both the Krause and Miller cases present political issues that are non-justiciable.

V. PETITIONERS' ALLEGATIONS THAT TRAINING, ARMING AND PROCEDURES OF THE OHIO NATIONAL GUARD WERE IMPROPER INDISPENSABLY REQUIRE JOINDER OF THE UNITED STATES OF AMERICA AS A PARTY-DEFENDANT.

Speaking for the majority in the Sixth Circuit consideration of these cases, Judge Weick stated:

> "It would appear that the United States was a necessary party to the determination of the issues as it was involved in the training of the National Guard and their use of weaponry. Failure to join an indispensable party requires dismissal of the action, Rules 12b and 19, Fed. R. Civ. P. Any decision rendered by the District Court relative to the train-

ing and weaponry of the Guard would require action to be taken by both state and federal governments. To require such action to be taken is beyond the jurisdiction of the Court. The United States has not consented to be sued." (Scheuer, 190)

In the view of Petitioners, Judge Weick wrongly concluded that because of the involvement of the United States in the training of the National Guard, the United States was required to be named a defendant. Petitioners' theory is that inasmuch as Peitioners did not state in their complaints that the United States government or federal officials were involved, as stated by Judge Weick, there is no way to arrive at the conclusion that they were in fact so involved. Such a notion ignores Article I, Sec. 8, Clause 16, of the United States Constitution, which, after providing that Congress shall have power to provide for the organizing, arming, disciplining and governing of the militia, reserved to the states the appointment of officers and the "authority of training the Militia according to the discipline prescribed by Congress." It likewise ignores relevant provisions of Title 32, United States Code, such as Section 108, providing that a state that does not comply with Title 32 shall lose its National Guard money; Section 110, providing that the President shall be the source of regulations and orders to organize, discipline and govern the National Guard; Section 501, providing that the discipline and training of the Army National Guard shall conform to that of the Army and the discipline of the Air National Guard to that of the Air Force.

Rule 19(a), Fed. R. Civ. P., states in pertinent part:

> "A person *** shall be joined as a party in the action if *** he claims an interest relating to the subject of the action and is so situated that the disposition of the action in his absence may *** leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of his

> claimed interest. If he has not been so joined, the Court shall order that he be made a party."

Rule 19(b) provides in pertinent part:

> "If a person as described *** cannot be made a party, the court shall determine whether in equity and good conscience the action *** should be dismissed, the absent person being thus regarded as indispensable. ***"

The provisions of the United States Constitution, Title 32 of the United States Code, and the Federal Rules of Civil Procedure are all matters of which the court takes judicial notice. The court likewise notes that the United States government, which is so intricately interwoven in the training, arming and discipline of the Guard, is indispensably a party and has not consented to be sued. Under the circumstances, Judge Weick reached the only possible conclusion, namely, he required dismissal of the actions.

When Petitioners assert that "any bar to this action premised upon the failure of the United States to consent to suit violates the due process and equal protection clauses of the XIV Amendment", they are arguing in a circle. What they are saying is that it is unconstitutional under the XIV Amendment for the sovereignty created by the United States Constitution to possess one of the attributes of sovereignty, namely, an immunity to suit in its own courts.

CONCLUSION

The cases of Petitioners Krause and Miller present no federal question of substance for review by this Court. Therefore, the writ prayed for should be denied.

Respectfully submitted,

R. BROOKE ALLOWAY
Counsel of Record for
Respondent James A. Rhodes

AFFIDAVIT OF SERVICE

State of Ohio

SS:

County of Franklin

I, R. Brooke Alloway, Senior Partner in the firm of Topper, Alloway, Goodman, DeLeone and Duffey, Counsel of Record for Respondent James A. Rhodes herein, hereby certify that on this 30th day of April, 1973, I served three copies of the foregoing *Brief of Defendant-Respondent James A. Rhodes in Opposition to Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit* on Steven A. Sindell and Joseph M. Sindell of Sindell, Sindell, Bourne, Stern & Spero, 1400 Leader Building, Cleveland, Ohio 44114, Attorneys for Petitioners Elaine B. Miller and Arthur Krause; Joseph Kelner of Kelner, Stelljes and Glotzer, 217 Broadway (Suite 600), New York, New York, 10007, Attorney for Petitioner Elaine B. Miller; Charles E. Brown, 42 East Gay Street, Columbus, Ohio 43215, Counsel of Record for Respondents Del Corso, Canterbury, Jones, Martin, Srp and White; Delmar Christensen, Second National Bank Building, Akron, Ohio, 44308, Attorney for Harry D. Jones and John E. Martin, Respondents herein; and C. D. Lambrose, 750 Prospect Avenue, Cleveland, Ohio, 44115, Attorney for Raymond J. Srp, Respondent herein, by depositing the same in a United States mail box, first class postage prepaid (and in the instance of Kelner, with air mail postage prepaid), addressed to each of the attorneys above at his designated

address, being the only parties hereto required to be served.

R. BROOKE ALLOWAY
Counsel of Record for
Respondent James A. Rhodes

Subscribed and sworn to before me this 30th day of April, 1973.

JOHN M. MCELROY,
Attorney at Law,
Notary Public—State of Ohio
My commission has no
expiration date.
Sec. 147.03, Ohio Revised Code

IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-1318

ARTHUR KRAUSE, Administrator of the Estate of Allison Krause, Deceased, *Petitioner*,

vs.

GOVERNOR JAMES RHODES, SYLVESTER DEL CORSO, and ROBERT CANTERBURY, *Respondents*,

and

ELAINE B. MILLER, Administratrix of the Estate of Jeffrey Glenn Miller, Deceased, *Petitioner*,

vs.

JAMES RHODES, SYLVESTER DEL CORSO, ROBERT CANTERBURY, HARRY D. JONES, JOHN E. MARTIN, RAYMOND J. SRP, ALEXANDER STEVENSON AND VARIOUS OFFICERS AND ENLISTED MEN AND ROBERT WHITE, *Respondents*.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF OF RESPONDENTS DEL CORSO, CANTERBURY, JONES, MARTIN, SRP, AND WHITE IN OPPOSITION

CHARLES E. BROWN, Counsel of Record
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BRIEF OF RESPONDENTS DEL CORSO, CANTERBURY, JONES, MARTIN, SRP, AND WHITE IN OPPOSITION

QUESTIONS PRESENTED[1]

1. Respondents are not satisfied with petitioners' first

[1]Although the Krause and Miller petition for a writ of certiorari raises diversity jurisdiction issues, the remaining questions are conterminous with those considered by the Scheuer petition, presently before this Court (*Scheuer, etc. v. Rhodes, et al.*, United States Supreme Court, Case No. 72-914). Therefore, respondents, herein, will follow the organization of the brief in opposition filed in the *Scheuer* case, *supra*, considering the diversity issues where appropriate.